



NORTH CAROLINA GENERAL ASSEMBLY

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Director

April 30, 2011

TO: Revenue Law Study Committee
FROM: Gerry Cohen, Director of Legislative Drafting
SUBJECT: Validity of Executive Order 113 extending Unemployment Benefits

I have been asked whether Executive Order 113 is sufficient under federal law to constitute approval of extended unemployment benefits, and whether it is valid under our State Constitution. It is my opinion that the Executive Order of the Governor is not sufficient under either State or federal law as outlined below to trigger a benefit extension.

Executive Order 113 was promulgated as a result of P.L. 112-78, which extended certain unemployment benefits from December 31, 2011 to February 29, 2012. Section 201(a)(4) of P.L. 112-78 contains the operative language amending Section 203(f) of the Federal-State Unemployment Compensation Act of 1970. Section 201(c) of P.L. 112-78 states that the act becomes effective as if it had been included in P.L. 111-312. Section 502(b) of Title V of PL 111-312, the "Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010". That act authorized through 12/31/2011 (and now through 2/29/2012 as provided by P.L. 112-78) the extension of benefits, provides that the extension in a particular state is made only as "***the State may by law provide***" (emphasis added). This language appears twice in that federal law. Section 502(b) is an amendment to Section 203(f) of the Federal-State Unemployment Compensation Act of 1970, P.L. 91-371 as amended. Section 205(f) of that act provides that "State law" is the "unemployment compensation law of the State, approved by the Secretary of Labor." In North Carolina, that law is Chapter 96 of the General Statutes, the "Employment Security Law".

Executive Order 113 recites that Section 6.16 of S.L. 2011-145 "codified" Executive Order 93, which was a similar executive order in 2011 that attempted to extend unemployment benefits without legislative action. EO 113 notes that both Executive Order 93 and Section 6.16 of S.L. 2011-145 expired 12/31/2011. Rather than concluding as does EO 113 that Section 6.16 somehow recognized or validated EO 93, it is my opinion that in fact the enactment of Section 6.16 indicates that the General Assembly did NOT recognize that EO 93 has independent validity. Section 6.16 does not mention EO 93.

In our State constitutional scheme "laws" are made only by the General Assembly. Article II, Section 22 provides that public bills, upon executive approval or override, become law. Numerous other provisions of the State Constitution provide that the General Assembly enacts laws, and Article II Section 1 provides that "The legislative power of the State shall be vested in the General Assembly, while Article I, Section 6 provides that the legislative and executive powers are "...separate and distinct..." Furthering the conclusion that Congress intended for "State law" to be made by the legislature of each state is Section 207(c) of the Federal-State Unemployment Compensation Act of 1970, which provided a special exception for States whose legislatures did not meet in regular session during 1971. Congress in the

amended 1970 legislation has clearly provided that the decision in each state is a legislative power, not an executive one. The General Assembly makes laws, not the executive branch.

The legal underpinning of the executive order is quoted and analyzed as follows, with my comments underlined and italicized:

1. Whereas, Article III, Section 1 of the State Constitution invests the executive power of the State in the Governor; *While the executive power of the State is vested in the Governor, by federal law and our State Constitution only legislative power is involved.*
2. Whereas, North Carolina General Statute §143-4 provides that the Governor, in accordance with Article III of the Constitution of North Carolina, is the Chief Executive Officer of the State and is responsible for formulating and administering the policies of the executive branch of the State government; *While the Governor is responsible for the policies of the executive branch, this has no relevance.*
3. Whereas, the Governor is the sole official liaison between the government of this State and the government of the United States; *I know of no legal basis for this conclusion, and even if it is so it has no relevance.*
4. Whereas, the Governor is the sole signatory for the State on agreements and contracts with the United States Department of Labor; *Whether true or not this has no relevance.*
5. Whereas, the North Carolina Department of Commerce Division of Employment Security ... is an agency of the executive branch of North Carolina state government and subject to the policies formulated and administered by the Governor, and is authorized by N.C. Gen. Stat. Chapter 96 to administer the extended benefits program in the State of North Carolina; *It is true that it is an agency of the executive branch and that she is given the power under N.C. Gen. Stat. Chapter 96 to administer the extended benefits program, but the issue is not an executive power of administration but a legislative power as to what the benefits are.*
6. Whereas, based upon the aforementioned provisions of the North Carolina Constitution and the North Carolina General Statutes, I hereby choose to exercise my authority because the extended benefits addressed by this Executive Order are federal funds that are being made available to the State of North Carolina by the United States Department of Labor without the need for any appropriation of state funds by the North Carolina General Assembly. *This is conclusory and in fact is not based on actual powers of the Governor under State and federal law.*

While I recognize that the U.S. Department of Labor in 2011 recognized the validity of EO 93 and began the benefits extension prior to approval of the General Assembly, I am of the opinion that such actions were not authorized by either federal law or the laws of our State.